Michigan Law Review

Volume 52 | Issue 6

1956

# EVIDENCE-HEARSAY-ADMISSIBILITY OF PUBLIC OPINION POLLS

John C. Hall S.Ed.
*University of Michigan Law School*

EVIDENCE—HEARSAY—ADMISSIBILITY OF PUBLIC OPINION POLLS—The Florida Supreme Court sustained the conviction of Irvin, a Negro, on a charge of rape,[1] but the Supreme Court of the United States reversed and remanded the case.[2] Defendant was granted a change of venue to Marion County, where he requested a second change of venue, claiming that the notoriety of his case had made him personally odious to the residents of Marion County. He attempted to introduce the results of a public opinion poll made by the Elmo Roper Research and Public Opinion Organization to support his claim.[3] The field supervisor and the tabulator were called to testify on the results of the poll, but no interviewers were called. The lower court ruled the evidence inadmissible. On appeal, *held,* affirmed. The testimony would have been hearsay on hearsay, and the use of dissociated questions in the interview prevented voluntary expression of attitude toward defendant. *Irvin v. State,* (Fla. 1953) 66 S. (2d) 288.

Public opinion polls have created a serious problem for the courts. While legislative[4] and administrative[5] bodies are using such surveys more and more frequently, the courts are reluctant to accept public opinion polls, in spite of their repeated statements that more satisfactory means of determining public opinion are needed than those presently used.[6] Grave doubt of the scientific validity of such tests and of the techniques used in interviewing is expressed.[7] However, when the court is convinced that the test has been carefully made, it may admit the results.[8] One of the principal reasons for rejection is that such a survey produces only hearsay. Two answers have been made to this: (1) the survey is not hearsay at all;[9] and (2) even when such a poll is hearsay, it should be admitted under one of the exceptions to the hearsay rule.[10] In many cases the poll will attempt to prove only the existence in

[1] Shepherd v. State, (Fla. 1950) 46 S. (2d) 880.

[2] Shepherd v. Florida, 341 U.S. 50, 71 S.Ct. 549 (1951).

[3] The case concerned itself more with public sentiment than opinion. See Sorensen, "The Admissibility and Use of Opinion Research Evidence," 28 N.Y. UNIV. L. REV. 1213 at 1224 (1953). Opinion includes the tendency to believe certain things about a person or thing and the response to stimulae in terms of that belief. Id. at 1215. On the general procedure of surveys, see PARTEN, SURVEYS, POLLS, AND SAMPLES (1950).

[4] See Javits, "How I Used a Poll in Campaigning for Congress," 11 PUB. OP. Q. 222 (1947).

[5] Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952); 66 HARV. L. REV. 498 (1953).

[6] Repouille v. United States, (2d Cir. 1947) 165 F. (2d) 152 (in determining "good moral character"). Cf. Parke-Davis and Co. v. H. K. Mulford Co., (D.C. N.Y. 1911) 189 F. 95.

[7] Alexander Young Distilling Co. v. National Distillers Prod. Corp., (D.C. Pa. 1941) 40 F. Supp. 748.

[8] People v. Franklin National Bank of Franklin Square, 200 Misc. 557, 105 N.Y.S. (2d) 81 (1951), revd. 281 App. Div. 757, 118 N.Y.S. (2d) 210 (1953), affd. 305 N.Y. 453, 113 N.E. (2d) 796 (1953), revd. (U.S. 1954) 74 S.Ct. 550. All appellate decisions were on other grounds.

[9] Household Finance Corp. v. Federal Finance Corp., (D.C. Ariz. 1952) 105 F. Supp. 164; S.C. Johnson & Son, Inc. v. Johnson, (D.C. N.Y. 1939) 28 F. Supp. 744, mod. and affd. (2d Cir. 1940) 116 F. (2d) 427.

[10] Kennedy, "Law and the Courts," THE POLLS AND PUBLIC OPINION 92 (1949); 37 MINN. L. REV. 385 (1953).

fact of a reaction on the part of those interviewed, not the truth of the statements these people may make.[11] A properly conducted poll can eliminate the dangers of hearsay testimony,[12] and introduction of the results at trial may be held both necessary and trustworthy, the usual requirements for an exception to the hearsay rule.[13] Many of the cases in which public opinion is relevant will otherwise require the production of a long array of witnesses or depositions,[14] and the other means now employed by the courts appear less trustworthy than a scientifically conducted survey.[15] In many respects the survey's interviews may resemble a courtroom examination,[16] and interviewing techniques can be employed in such a way as to make falsehood unlikely.[17] Since the attorney can be sure the court will carefully scrutinize the reliability and scientific validity of the survey, he will be unwilling to make the expensive outlay required for a poll unless he can expect a high degree of accuracy in the result, thus tending to make polls even more trustworthy.[18] The principal case suggests yet another objection to admissibility, the question of hearsay on hearsay. While such evidence is generally inadmissible,[19] there are two precedents for admitting a survey on the basis of testimony by the tabulator or supervisor without need of a string of statements by the interviewers: the "usual course of business" rule suggested by the Uniform Business Records as Evidence Act,[20] and expert testimony in general.[21] Even courts which admit polls have hesitated in giving them much weight.[22] However, it would appear that the question of weight should be resolved upon the determination of reliability and validity of the techniques used in the given case.[23] Such a test would resolve the special problem created when both parties introduce polls with opposite results.[24] The principal case ap-

[11] There is a danger, however, when the poll is to show sincerity of belief, as in the principal case, rather than mere opinion.

[12] The dangers include inability to test the declarant's sincerity, narrative ability, perception, and memory. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 HARV. L. REV. 177 (1948); 5 WIGMORE, EVIDENCE, 3d ed., §1362 (1940).

[13] 5 WIGMORE, EVIDENCE, 3d ed., §1420 (1940); Cone v. Benjamin, 157 Fla. 800, 27 S. (2d) 90 (1946).

[14] Cf. Elgin Nat. Watch Co. v. Elgin Clock Co., (D.C. Del. 1928) 26 F. (2d) 376.

[15] E.g., judge's opinion: Campbell Soup Co. v. Armour & Co., (3d Cir. 1949) 175 F. (2d) 795; judge's random poll: Triangle Publications v. Rohrlich, (2d Cir. 1948) 167 F. (2d) 969; testimony of those who should know: principal case.

[16] Sorensen, "The Admissibility and Use of Opinion and Research Evidence," 28 N.Y. UNIV. L. REV. 1213 at 1237 (1953).

[17] But see Hyman, "The Biasing Effect of Interviewer Expectations on Survey Results," 14 PUB. OP. Q. 491 (1950).

[18] 66 HARV. L. REV. 498 (1953).

[19] Radtke v. Taylor, 105 Ore. 559, 210 P. 863 (1922).

[20] 9 U.L.A. 385 (1951). See also 28 U.S.C. (Supp. V, 1952) §1732; Shepherdson Co. v. Central Fire Ins. Co. of Baltimore, 220 Minn. 401, 19 N.W. (2d) 772 (1945).

[21] State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924). Cf. Elgin Nat. Watch Co. v. Elgin Clock Co., note 14 supra.

[22] Dupont Cellophane Co. v. Waxed Products Co., (2d Cir. 1936) 85 F. (2d) 75, cert. den. 299 U.S. 601, 57 S.Ct. 194 (1936).

[23] Sorensen, "The Admissibility and Use of Opinion Research Evidence," 28 N.Y. UNIV. L. REV. 1213 (1953); United States v. 88 Cases, (3d Cir. 1951) 187 F. (2d) 967.

[24] Quaker Oats Co. v. General Mills, Inc., (7th Cir. 1943) 134 F. (2d) 429.

pears to be in line with authority, with the possible exception of the trademark cases,[25] but the careful planning of the survey introduced by the defendant and the state's cumbersome presentation of many "leading citizens" to state their opinions indicate real need for review of the problem. As a few courts have recognized, public opinion polls can be planned with sufficient care to be reliable and valid indications of the truth of their content, and, upon the laying of a thorough foundation, should be admitted as evidence of the truth of that content.[26] The courts should do away with arbitrary, and often unrealistic, applications of the hearsay rule, accepting or rejecting the poll results in each case upon a test of the validity and reliability of the techniques of the particular survey and the qualifications of those who interpret them.[27]

*John C. Hall, S.Ed.*

[25] Cf. Dupont Cellophane Co. v. Waxed Products Co., note 22 supra.

[26] People v. Franklin National Bank of Franklin Square, note 8 supra. See note 10 supra.

[27] The problem of who must testify presents a special problem. Perhaps both interviewers and supervisors must: Household Finance Corp. v. Federal Finance Corp., note 9 supra; or just interviewers: United States v. 88 cases, note 23 supra. The expert testimony of the tabulator, backed by the supervisor, should be sufficient, however. See notes 20 and 21 supra.